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## NOTES

### *Constitutional Law*

#### STATE PRICE FIXING FOR PERSONAL SERVICES UNDER THE GUISE OF THE EXERCISE OF THE POLICE POWER

##### *Introduction*

Price fixing for the personal services of the barbering and dry cleaning trades has engaged the attention of several state courts for the past seventeen years. Such price fixing has been sustained in Florida, Louisiana, Minnesota, New Mexico and Oklahoma; and rejected in Alabama, Arkansas, Arizona, California, Indiana, Iowa, Oregon and Tennessee.

Generally, every decision has been rendered by a divided court, with the minority objecting vigorously to the ground upon which the majority opinion is based. All agree that the right to fix prices is derived from the police power of the state, and that conditions must exist which invoke its action.<sup>1</sup>

Those courts that have sustained such regulations have based their opinions on the principle that the trade or business in connection with which the services are to be performed must be a business "affected with a public interest." These courts have found a relationship between prices and public health or welfare in justifying the exercise of the police power by the legislatures.<sup>2</sup>

Those courts that have taken the opposite view in holding such price fixing legislation unconstitutional have stressed the fact that the constitutional safeguards for individual rights and liberties do not permit legislative exercise of the police power in this field. More specifically, the abridgment of the privileges and immunities, and due process and equal protection provisions of the Constitution are invoked to strike down the price fixing statutes. These courts deny that the trade or business is so "affected with a public interest" or clothed with a public use as to warrant the legislatures, through the police power, to fix minimum prices.<sup>3</sup>

The reason the legislatures wish to regulate the prices of the barber and dry cleaning businesses is to relieve these businesses from the ruthless competition and destructive price cutting that takes place within them.<sup>4</sup> The small businessmen in these trades suffered severely during the Great Depression. Many of the statutes enacted during that period were

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<sup>1</sup> *State v. McMasters*, 204 Minn. 438, 283 N.W. 767, 770 (1939).

<sup>2</sup> *Ibid.*

<sup>3</sup> See, e.g., *Edwards v. State Board of Barber Examiners*, 72 Ariz. 108, 231 P.2d 450, 452-3 (1951).

<sup>4</sup> See dissent, *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners*, 254 P.2d 29, 37 (Cal. 1953), for description of competition in the dry cleaning trade in California.

cited as emergency measures;<sup>5</sup> others were based on the unfair trade practice acts.<sup>6</sup> But the legislatures in most of the statutes relied on the public health and safety aspect: minimum prices were needed in order to maintain health and safety requirements. It is the purpose that is stated by the legislatures in the preambles to the statutes, as well as the effect of such statutes, that the courts consider in determining their constitutionality.

### *Courts Upholding the Price Fixing Measures*

Most courts, in upholding the constitutionality of minimum prices for barbers, have used the test that those businesses or trades "affected with a public interest" may be regulated by the legislatures,<sup>7</sup> and the barber trade has been found to be so affected.<sup>8</sup> This conclusion has been drawn from the fact that the services of the barber "directly affect the human anatomy,"<sup>9</sup> and minimum prices are necessary to enable the barber to maintain health and sanitary requirements which might otherwise be sacrificed in price wars and unfair competition.<sup>10</sup> This reason has been given in holding that the barber trade is "affected with a public interest" and subject to price regulations in spite of the fact that at least three of the states so holding had other laws enforcing cleanliness in barber shops and preventing diseased barbers from plying their trade.<sup>11</sup>

The Supreme Court of Florida has found legislative authority to fix reasonable prices on the ground that the business of barbering is of a public nature,<sup>12</sup> and the Florida constitution has given express authority to the legislature to regulate such businesses in order to correct certain evils which may exist within them.<sup>13</sup> Moreover this court has taken a

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<sup>5</sup> *Ex parte Kazas*, 22 Cal. App.2d 161, 70 P.2d 962, 963 (1937); *Duncan v. Des Moines*, 222 Iowa 218, 268 N.W. 547 (1936); *State v. Greeson*, 174 Tenn. 178, 124 S.W.2d 253, 255 (1939).

<sup>6</sup> *State v. McMasters*, 204 Minn. 438, 283 N.W. 767 (1939).

<sup>7</sup> This test was first used by the United States Supreme Court in *Munn v. Illinois*, 94 U.S. 113 (1877), and by it, whether intentionally or not, the Court placed a limitation on the price fixing power of the states. The test was subsequently used to determine the validity, under the due process clause, of state regulation of business.

<sup>8</sup> *McRae v. Robbins*, 151 Fla. 109, 9 So.2d 284 (1942); *Board of Barber Examiners v. Parker*, 190 La. 214, 182 So. 485 (1938); *Arnold v. Board of Barber Examiners*, 45 N.M. 57, 109 P.2d 779 (1941); *State Dry Cleaners' Board v. Compton*, 201 Okla. 284, 205 P.2d 286 (1949).

<sup>9</sup> *Board of Barber Examiners v. Parker*, 190 La. 214, 182 So. 485, 505 (1938).

<sup>10</sup> *Herrin v. Arnold*, 183 Okla. 392, 82 P.2d 977 (1938).

<sup>11</sup> *Board of Barber Examiners v. Parker*, 190 La. 214, 182 So. 485, 492 (1938); *Arnold v. Board of Barber Examiners*, 45 N.M. 57, 109 P.2d 779, 786 (1941); *Herrin v. Arnold*, 183 Okla. 392, 82 P.2d 977, 979 (1938).

<sup>12</sup> *McRae v. Robbins*, 151 Fla. 109, 9 So.2d 284 (1942).

<sup>13</sup> FLA. CONST. ART. XVI, § 30: "The Legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in trans-

very liberal view of the "public interest" test in legislation fixing minimum prices for the dry cleaning industry. *Miami Laundry Co. v. Florida Dry Cleaning & Laundry Board*, 134 Fla. 1, 183 So. 759, 763 (1938):

There is no magic in the phrase, "clothed with or affected with a public interest." Any business is affected by a public interest when it reaches such proportions that the interest of the public demands that it be reasonably regulated to conserve the rights of the public and when this point is reached, the liberty of contract must necessarily be restricted. If the regulation involves the question of price limitation, it will be upheld unless clearly shown to be arbitrary, discriminating, or beyond the power of the legislature to enforce.

The court went on to uphold minimum prices for dry cleaning since such action by the legislature was not clearly arbitrary, discriminatory or unwarranted.

Three United States Supreme Court cases, *Adkins v. Children's Hospital*,<sup>14</sup> *Nebbia v. New York*<sup>15</sup> and *West Coast Hotel Co. v. Parrish*,<sup>16</sup> are mentioned frequently in both the opinions upholding and those denying the constitutionality of personal service price fixing. One especially, the *Nebbia* case, is relied upon as giving authority to legislatures to fix prices for barbers and dry cleaners. The Supreme Court in this case approved a legislative act of the State of New York establishing minimum prices for milk on the theory of a close connection between such prices and the survival of their milk industry. The act was held to be in the interest of the public health.

The following passages from that decision are often cited or referred to by the courts as giving Supreme Court approbation to regulation of the barber or dry cleaning business by setting out minimum prices for their services:<sup>17</sup>

The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negated many years ago.

And further:<sup>18</sup>

The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.

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porting persons and property, or performing other services of a public nature; and shall provide for enforcing such laws by adequate penalties or forfeitures."

<sup>14</sup> 261 U.S. 525 (1923).

<sup>15</sup> 291 U.S. 502 (1934).

<sup>16</sup> 300 U.S. 379 (1937).

<sup>17</sup> *Nebbia v. New York*, 291 U.S. 502, 532 (1934).

<sup>18</sup> *Id.* at 538-39.

The courts sustaining price fixing put such legislation to this constitutional test proposed in *Nebbia*, that is, whether the various statutes or ordinances providing for minimum prices are arbitrary, discriminatory or have an unreasonable relation to the legislative purpose.<sup>19</sup> As viewed by the courts upholding price fixing in this field these statutes and ordinances meet this test.

The *West Coast Hotel Co.* case, decided in 1937, three years after the *Nebbia* decision, held that the minimum wage law for minors and women of the State of Washington was valid and did not violate the due process clause of the Constitution. Here the Court expressly overruled *Adkins v. Children's Hospital*, the case which held unconstitutional an act of Congress which authorized a designated board in the District of Columbia to fix minimum wages for women and children to supply the necessary costs of living.

Some of the earlier decisions<sup>20</sup> in which price fixing measures in the barbering trade were held unconstitutional were based mainly on *Adkins*. After this case was overruled by the *West Coast Hotel Co.* decision, these earlier cases were no longer considered authoritative, and the *Nebbia* and *West Coast Hotel Co.* cases have been cited as controlling authority for sustaining price fixing.<sup>21</sup> Those courts which have not followed these two cases and which persisted in holding the price regulations unconstitutional are considered "contrary to the weight of recent authority and the better reasoned decisions."<sup>22</sup>

A few of the courts have attempted to resolve the apparent conflict between their decisions restricting freedom of contract and those upholding the right to the fruits of one's own labor. It has been expressed that the constitutional "guaranties must be determined in the light of social

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<sup>19</sup> *Miami Laundry Co. v. Florida Dry Cleaning & Laundry Board*, 134 Fla. 1, 183 So. 759 (1938); *Board of Barber Examiners v. Parker*, 190 La. 214, 182 So. 485 (1938); *Arnold v. Board of Barber Examiners*, 45 N.M. 57, 109 P.2d 779 (1941); *State Dry Cleaners' Board v. Compton*, 201 Okla. 284, 205 P.2d 286 (1949); *Herrin v. Arnold*, 183 Okla. 392, 82 P.2d 977 (1938).

<sup>20</sup> *Mobile v. Rouse*, 27 Ala. App. 344, 173 So. 254, 261, *cert. denied*, 233 Ala. 622, 173 So. 266 (1937); *Duncan v. Des Moines*, 222 Iowa 218, 268 N.W. 547 (1936). The basis of the position that price regulations for barbers were unconstitutional taken by the Florida court in *State ex rel. Fulton v. Ives*, 123 Fla. 401, 167 So. 394 (1936) was subsequently distinguished and abandoned in *Miami Laundry Co. v. Florida Dry Cleaning & Laundry Board*, 134 Fla. 1, 183 So. 759 (1938), which upheld such price regulations for dry cleaners. *Cf. McRae v. Robbins*, 151 Fla. 109, 9 So.2d 284 (1942), in which the court relied upon the Florida constitution to sustain reasonable price fixing for barbers in that state.

<sup>21</sup> *Miami Laundry Co. v. Florida Dry Cleaning & Laundry Board*, 134 Fla. 1, 183 So. 759 (1938); *Board of Barber Examiners v. Parker*, 190 La. 214, 182 So. 485 (1938); *Arnold v. Board of Barber Examiners*, 45 N.M. 57, 109 P.2d 779 (1941); *State Dry Cleaners' Board v. Compton*, 201 Okla. 284, 205 P.2d 286 (1949); *Herrin v. Arnold*, 183 Okla. 392, 82 P.2d 977 (1938).

<sup>22</sup> *Arnold v. Board of Barber Examiners*, 45 N.M. 57, 109 P.2d 779, 786 (1941).

and economic conditions that prevail at the time the guaranty is proposed to be exercised rather than at the time the Constitution was approved securing it. . . ."<sup>23</sup> The limitations upon the police power are looked upon as being<sup>24</sup>

. . . plastic in their nature and will expand to meet the actual requirements of an advancing civilization and adjust themselves to the necessities of our multiplying complexities in moral, sanitary, economic, and political conditions.

The Supreme Court of Florida has taken the position that there are two factors to consider in all such cases, namely, the protection of the public on the one hand, and the freedom to run one's trade or business as one sees fit, on the other.<sup>25</sup>

### *Courts Striking Down the Price Fixing Measures*

Those courts which deny that minimum price fixing statutes for personal services are constitutional distinguish the decision in *Nebbia v. New York* from the personal service regulations before them.<sup>26</sup>

Price cutting by the competitors in the New York milk business was producing waste and was threatening ultimately to cut off the supply of milk and to destroy the industry itself. The result would have affected most disastrously the public welfare. There is nothing like that, it was said, in the personal services trades.<sup>27</sup> Milk is essential, and its production and distribution a paramount industry of the state; it has peculiar factors of instability calling for special control.<sup>28</sup> Those factors are not present in the barber and dry cleaning cases before the courts. These two personal service trades, however convenient to a large portion of the public, are not basic or paramount industries.

The *Nebbia* decision, it has been pointed out, did not open the flood gates to price controls on any and every kind of business, trade or occupation.<sup>29</sup> The following passages from that opinion are quoted to emphasize this point: <sup>30</sup>

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<sup>23</sup> *Miami Laundry Co. v. Florida Dry Cleaning & Laundry Board*, 134 Fla. 1, 183 So. 759, 762 (1938).

<sup>24</sup> *Ex parte Tindall*, 102 Okla. 192, 229 Pac. 125, 130 (1924), quoted in *Herrin v. Arnold*, 183 Okla. 392, 82 P.2d 977, 979 (1938).

<sup>25</sup> *Miami Laundry Co. v. Florida Dry Cleaning & Laundry Board*, 134 Fla. 1, 183 So. 759, 764 (1938).

<sup>26</sup> *Mobile v. Rouse*, 27 Ala. App. 344, 173 So. 254, 262-63, *cert. denied*, 233 Ala. 622, 173 So. 266 (1937); *Noble v. Davis*, 204 Ark. 156, 161 S.W.2d 189 (1942); *Christian v. La Forge*, 194 Ore. 450, 242 P.2d 797 (1952). See dissent on rehearing *Board of Barber Examiners v. Parker*, 190 La. 214, 182 So. 485, 514 (1938).

<sup>27</sup> *State v. Greeson*, 174 Tenn. 178, 124 S.W.2d 253 (1939). See dissent on rehearing, *Board of Barber Examiners v. Parker*, 190 La. 214, 182 So. 485, 514 (1938).

<sup>28</sup> *Mobile v. Rouse*, 27 Ala. App. 344, 173 So. 254, 263, *cert. denied*, 233 Ala. 622, 173 So. 266 (1937).

<sup>29</sup> *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners*, 234 P.2d 220, 225

... a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts.

And again: <sup>31</sup>

It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory.

The courts holding these price fixing measures unconstitutional state that the earlier decisions<sup>32</sup> relying on *Adkins*, which was subsequently overruled, were based on the fact that the statutes of those states were not regulatory, but mere price fixing statutes, having no real or substantial relation to the public health, safety, welfare or prosperity. And therefore, on that basis, the earlier cases are distinguishable from the *Nebbia* decision.<sup>33</sup>

These courts have held the barbering trade not to be a business "affected with a public interest."<sup>34</sup> They are unable to see, in either logic or common sense, the relationship between public health and safety and price fixing in the barbering profession.<sup>35</sup> *State v. Greeson*<sup>36</sup> and *Noble v. Davis*<sup>37</sup> quote with approval the dissenting opinion on rehearing in *Board of Barber Examiners v. Parker*, which points out the lack of any reasonable relationship between prices and health in the barber trade: <sup>38</sup>

The only question in these cases is whether a statute authorizing a public board to fix the minimum fees that a barber may charge for his services really tends to protect the public health. It is not disputed that the barbers' trade is one which may endanger the public health, and which is therefore subject to regulation by the Legislature. But I do not see how an act of the Legislature prescribing the minimum fees . . . that a barber may charge for his services can protect, or have a tendency to protect, the public health. The only appropriate way in which the Legislature can protect the public health, or promote the public welfare . . . is to establish sanitary require-

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(Cal. App. 1951), *aff'd*, 254 P.2d 29 (1953); *Christian v. La Forge*, 194 Ore. 450, 242 P.2d 797, 806 (1952).

<sup>30</sup> *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

<sup>31</sup> *Id.* at 536.

<sup>32</sup> See cases cited note 19 *supra*.

<sup>33</sup> *Noble v. Davis*, 204 Ark. 156, 161 S.W.2d 189 (1942); *State v. Greeson*, 174 Tenn. 178, 124 S.W.2d 253 (1939).

<sup>34</sup> *Mobile v. Rouse*, 27 Ala. App. 344, 173 So. 254, *cert. denied*, 233 Ala. 622, 173 So. 266 (1937); *Ex parte Kazas*, 22 Cal. App.2d 161, 70 P.2d 962 (1937); *State Board of Barber Examiners v. Cloud*, 220 Ind. 552, 44 N.E.2d 972 (1942).

<sup>35</sup> *Edwards v. State Board of Barber Examiners*, 72 Ariz. 108, 231 P.2d 450 (1951). See concurring opinion, *Revne v. Trade Commission*, 113 Utah 155, 192 P.2d 563 (1948).

<sup>36</sup> 174 Tenn. 178, 124 S.W.2d 253, 258 (1939).

<sup>37</sup> 204 Ark. 156, 161 S.W.2d 189, 191 (1942).

<sup>38</sup> 190 La. 214, 182 So. 485, 512 (1938).

ments . . . and to enforce them. . . . If a barber complies with all of the requirements . . . it cannot possibly endanger the public health or the public welfare . . . to charge lower rates for his services than the proprietors of the deluxe barber shops. . . .

The general welfare division of the police power cannot be invoked to bring the minimum price regulations for barbers within constitutional bounds.<sup>39</sup> In this connection, the Supreme Court of California has said<sup>40</sup> that to justify and support the term "general welfare," legislation should at least promote the welfare of the general public as contrasted with that of a small percentage or insignificant numerical proportion of the citizenry. Thus these courts have concluded that the legislation before them was not intended to promote the welfare of the people as a whole, but only a small group, the barbers, comprising a very small proportion of the population of their states.<sup>41</sup>

Many of the courts striking down these price fixing statutes emphasize the constitutional guaranties of personal liberty — the right to acquire, hold and dispose of property, and the right to contract with respect to one's own labor.<sup>42</sup> The later cases especially urge this argument. The right to purchase and sell one's own labor is guaranteed by the Fourteenth Amendment to the Federal Constitution. This and the other liberties can only be sacrificed on a clear showing of a benefit to the public commensurate with the loss of the individual rights.<sup>43</sup> In a recent case, *Christian v. La Forge*, it was stated: <sup>44</sup>

It is only when the interests and welfare of the public in general are clearly threatened by the unrestricted exercise of the individual right, that the individual right must give way to reasonable limitation and regulation for the public good. The courts must ever be watchful to protect the personal rights guaranteed by state and federal constitutions, and to prevent encroachments thereon by legislative fiat, unless actually essential to the protection of the public welfare.

A favorite argument of the courts is to consider the effect of these price regulations by conjuring up the extent to which such regulations may be imposed on other trades or businesses if allowed for the barber or dry cleaning industry. Such regulations, it is said, pour the barbers into a common mould, turning them out exactly alike regardless of skill or

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<sup>39</sup> *Ex parte Kazas*, 22 Cal. App.2d 161, 70 P.2d 962 (1937); *State Board of Barber Examiners v. Cloud*, 220 Ind. 552, 44 N.E.2d 972 (1942); *Christian v. La Forge*, 175 Ore. 154, 242 P.2d 797 (1952).

<sup>40</sup> *Ex parte Kazas*, 22 Cal. App.2d 161, 70 P.2d 962, 968 (1937).

<sup>41</sup> See cases cited note 39 *supra*.

<sup>42</sup> *Edwards v. State Board of Barber Examiners*, 72 Ariz. 108, 231 P.2d 450, 453 (1951); *Noble v. Davis*, 204 Ark. 156, 161 S.W.2d 189, 192 (1942); *State Board of Barber Examiners v. Cloud*, 220 Ind. 552, 44 N.E.2d 972, 980 (1942); *Christian v. La Forge*, 175 Ore. 154, 242 P.2d 797 (1952).

<sup>43</sup> *Edwards v. State Board of Barber Examiners*, 72 Ariz. 108, 231 P.2d 450 (1951); *State v. Greeson*, 174 Tenn. 178, 124 S.W.2d 253, 256 (1939).

<sup>44</sup> 194 Ore. 450, 242 P.2d 797, 803 (1952).



efficiency.<sup>45</sup> While the butcher, the baker and the candlestick maker may set the price for their services, the barber is deprived of this privilege.<sup>46</sup> What today is considered as a shield for a particular trade may tomorrow become a sword in the hands of the public, if they choose to enact maximum price legislation.<sup>47</sup> One can test the soundness of a principle, it is stated, by applying it to different factual situations: fees could be fixed for physicians and dentists, hotels and restaurants, *ad infinitum*.<sup>48</sup>

The latest case on the subject of price fixing in the field of personal services comes from the Supreme Court of California.<sup>49</sup> That court had before it the question of the validity of the California Dry Cleaner's Act. This act authorized the State Board of Dry Cleaners to establish a minimum price schedule for services of dry cleaners, dyers and pressers. The act was declared unconstitutional in a four to three decision on the authority of *Ex parte Kazas*.<sup>50</sup> The court held the act did not provide for the general welfare, nor for public health, safety or morals. It compared *Nebbia* with the *Kazas* case respecting the use of the phrase "affected with a public interest," and implied that the dry cleaning industry in California was not so "affected with a public interest" as to subject it to legislative control for the public good. A vigorous minority dissented<sup>51</sup> on the grounds that the "affected with a public interest" test has been discarded, and that there were economic, health and safety grounds on which the legislature could reasonably have concluded that minimum prices were needed, and therefore, in view of the *Nebbia* and *West Coast Hotel Co.* cases, the act should be held constitutional.

### Conclusion

There is no end in sight of the strong disagreement over the constitutionality of personal service price fixing legislation. When, in the future, courts are faced with such a question, they will have sufficient authority upon which to rely whether they choose one side or the other. This is a problem of a social and economic nature. However, social and economic programs are for the legislature, not the judiciary. If the programs are put to the constitutional tests, in which individual liberty is balanced with the rights of the public, the judiciary has done its duty.

James A. Uhl

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<sup>45</sup> *Ex parte Kazas*, 22 Cal. App.2d 161, 70 P.2d 962, 964 (1937).

<sup>46</sup> *Mobile v. Rouse*, 27 Ala. App. 344, 173 So. 254, 260, *cert. denied*, 233 Ala. 622, 173 So. 266 (1937).

<sup>47</sup> *Christian v. La Forge*, 194 Ore. 450, 242 P.2d 797, 807 (1952).

<sup>48</sup> *State v. Greeson*, 174 Tenn. 178, 124 S.W.2d 253, 258 (1939).

<sup>49</sup> *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners*, 254 P.2d 29 (Cal. 1953).

<sup>50</sup> 22 Cal. App.2d 161, 70 P.2d 962 (1937).

<sup>51</sup> *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners*, 254 P.2d 29, 37, 39 (Cal. 1953).